**CHIN SIN MOTOR WORKS SDN. BHD. & ANOR.** *a*

**v.**

**AROSA DVPT. SDN. BHD. & ANOR.**

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-22-536-90]
16 OCTOBER 1991 *b*

***TORT:*** *Negligent misrepresentation - Architect issuing certificate of completion prematurely - Monies released by bankers - Electricity supply only connected 4 years later - Loss on terms of interest paid on loan - Whether architect owed duty of care to plaintiff - Plaintiffs' reliance on certificates of architect* *c*

By a written sale and purchase agreement the first defendant (D1) agreed to sell and the first plaintiff P1 agreed to purchase a piece of land with a building to be erected thereon by the D1. The purchase price was to be paid to D1 by progressive instalments.

At all material times the second defendant (D2) was the architect for D1 and as such it was D2's duty under the sale and purchase agreement to certify each stage of completion of the building for which certification would be relied upon by P1 and/or its financier, the second plaintiff (P2) for the purpose of making instalment payments to D1 of the purchase price. *d*

D2 certified that sums totalling RM92,000 had become due and payable and in reliance thereof P2 paid to D1 the said sums.

By certification it was asserted that electricity had been supplied to the building when in fact it was only connected 4 years later. *e*

The plaintiffs filed an action asserting that the negligence of the defendants caused them loss and damage. The plaintiffs' application for summary judgment was dismissed by the Senior Assistant Registrar (SAR).

At the hearing in the High Court the plaintiffs confined their submission against the decision of the SAR in respect of D2 and abandoned the decision of the SAR against D1. *f*

**Held:**

**[1]** D2 was guilty of negligence and or misrepresentation as it was D2 who certified final payments amounting to RM92,000 based on which P2 made payments to D1.

**[2]** Further, the fact that an application for electricity could only be made to LLN on or about 3 years later after the date the certificate was issued, on a balance of probabilities shows that the electrical works had not been completed or satisfactorily completed when D2 issued its certificate, on which P1 relied. *g*

**[3]** There is a duty situation whenever the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that where the other gave information or advice when he knew or ought to have known that the inquirer was relying on him. *h*

**[4]** It is clear that D2 whose duty was to issue a certificate of final payments when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty of care to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments D1. *i*

*[Plaintiffs' appeal against D2 allowed; damages to be assessed by the Court.]*

**Ed. note:** The 2nd defendant has appealed to the Supreme Court.

**Cases referred to:**
*Grant v. Australian Knitting Mills Ltd. [1936] AC 85* ***(foll)***
*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465* ***(foll)***
*Dutton v. Bognor Regis Urban District Council [1972] 1 QB 373* ***(foll)***

**Legislation referred to:**
Rules of the High Court 1980, O. 14 r. 1

*For the plaintiffs - E.H. Lim, M/s. Mah Kok & Din*
*For the 2nd defendant - Shafik Fauzan, M/s. Mun & Company*

**JUDGMENT**

**Lim Beng Choon J:**

In this action the 1st plaintiff purchased a piece of land from the 1st defendant who also agreed to construct a building thereon for the purchase price of RM460,000. The first plaintiff entered into a loan agreement with the 2nd plaintiff who was to make progressive payments towards the purchase price. After filing their writ and statement of claim the plaintiffs applied under O. 14 r. 1 of the Rules of High Court 1980 for leave to enter interlocutory judgment against both the 1st defendant and the 2nd defendant who was the architect of the 1st defendant in respect of the construction of the building. The application for summary interlocutory judgment of the plaintiff was dismissed by the Senior Assistant Registrar (SAR) on 30 March 1991. Being dissatisfied with the decision of the SAR the plaintiffs appealed to me on 1 April 1991. At the hearing before me on 25 July 1991 Counsel for the plaintiffs confined his submission against the decision of the SAR in respect of the 2nd defendant and abandoned the decision of the SAR against the 1st defendant. I allowed the appeal against the 2nd defendant and directed that damages against the 2nd defendant be assessed by the Court. The 2nd defendant now appeals against my decision to the Supreme Court and I hereby give my grounds of judgment. It is necessary at the outset to give a brief summary of the averments of the plaintiffs as appeared in their statement of claim. By a written sale and purchase agreement dated 1 April 1985 made between the 1st plaintiff and the 1st defendant, (the sale and purchase agreement) the 1st defendant agreed to sell and the 1st plaintiff agreed to purchase a piece of land with a building to be erected thereon by the 1st defendant. By Clause 4(1) of the said agreement the purchase price was to be paid to the 1st defendant by instalments progressively according to the stages of completion of the building set out in the 3rd Schedule of the said agreement. By item (3) of the 3rd Schedule, an instalment in the sum of RM69,000 would become due and payable to the 1st defendant on handing over vacant possession of the land and building with connection of water and electricity supply to the said building. By item (4) of the 3rd Schedule a final instalment of RM23,000 would be due and payable to the first defendant but which was to be held by the 1st defendant's solicitors as stakeholders and payments thereof to be made in two instalments that is to say a sum of RM11,500 upon the expiry of 6 months and the balance of RM11,500 at the expiry of 12 months after handing over of vacant possession. At all material times the 2nd defendant was the architect for the 1st defendant and as such it was the 2nd defendant's duty under the sale and purchase agreement to certify each stage of completion of the building for which certification would be relied upon by the 1st plaintiff and/or its financier the 2nd plaintiff for the purposes of making instalment payments to the 1st defendant of the purchase price. The 2nd defendant therefore owed a duty to the 1st

plaintiff to ensure that its certification of each stage of completion of the building would be true and accurate. On 22 December 1986, the 2nd defendant certified in writing that the building had been completed to the stage of handing over of vacant possession and connection of water and electricity supply to the building. By a letter dated 24 December 1986, the 1st defendant submitted to the 2nd plaintiff the certificate of the 2nd defendant notifying the 2nd plaintiff that the sums of RM69,000 and RM23,000 had become due and payable by the 1st plaintiff to the 1st defendant and its solicitors respectively. On 13 January 1987 in reliance on the 1st defendant's letter and the 2nd defendant's certificate, the 2nd plaintiff on behalf of the 1st plaintiff, paid to the 1st defendant and its solicitors the said sums of RM69,000 and RM23,000 respectively. It was asserted that in fact electricity supply was connected to the building thereby enabling the 1st defendant to deliver vacant possession of the building to the 1st plaintiff only on 7 March 1990 and the certification of the 2nd defendant and the notification of the 1st defendant was false and misleading. The 1st defendant had therefore received the said sums of RM69,000 and RM23,000 to the use of the 1st plaintiff over the period of 13 January 1987 to 7 March 1990. The 2nd defendant was negligent in the certification and the plaintiffs gave particulars of the 2nd defendant's negligence which were:

(1) Certifying that the abovementioned stage of completion had been reached when it was not true;

(2) Failure to ascertain the actual stage of completion; and

(3) Knew or ought to have known that the 1st plaintiff and/or its financiers would rely upon the certification to make instalment payments to the 1st defendant when it was not due and payable.

By reason of the matters aforesaid, the 1st plaintiff therefore claimed against both the 1st and 2nd defendant:

(a) damages referred to in para. 15 of the statement of claim;

(b) interest thereon at such rate and period as the Court deemed fit;

(c) costs.

It is to be noted that I only summarised the averments of the plaintiffs' statement of claim insofar as they are related to the claim of the plaintiffs against the 2nd defendant. I have omitted most of the averments of the plaintiffs relating to their claim against the 1st defendant since at the hearing of the plaintiffs' appeal Counsel for the plaintiff had as stated earlier confined himself in attacking the decision of the SAR insofar as it concerned the 2nd defendant. In its defence, the 2nd defendant denied all the charges of negligence made against it and particularly averred that firstly the 2nd defendant did not owe a duty of care to the plaintiffs. Secondly in any event at the time of issuing of its certificate of payment all the connections for the supply of electricity and water were completed. It was through the 1st plaintiff's unwillingness and/or negligence in failing to pay the necessary deposits to the authorities concerned that they would not supply electricity and water to the building. The 2nd defendant also denied that the 1st plaintiff suffered any losses or damages and put the 1st plaintiff to strict proof of the same. In its affidavit in support of its application for summary interlocutory judgment the director Low Hup Seng of the 1st plaintiff affirmed the said affidavit on 4 October 1990 in which the following relevant documents were annexed thereto as:

Exhibit "LHS1": the sale and purchase agreement executed between the 1st defendant and the 1st plaintiff on 15 April 1985.

Exhibit "LHS2": the certification of the 2nd defendant dated 22 December 1986 in which it was stated:

> This is to certify that the 3½ storey shophouse on Lot Nos. SH-1 to SH-24 Taman Putra Sulaiman-1B have been completed up to the stage of: Handing over of vacant possession and connection of water and electricity supply to the building...15%. To be held by vendor's solicitors as stakeholders ... 5%
>
> Signed
>
> Wong Kin Men Associates,
> Chartered Architects
> Room 4.107-4.109
> 4th Floor Wisma Central
> Jalan Ampang 50450 Kuala Lumpur

Exhibit "LHS3": the first defendant's notice to the 2nd plaintiff dated 24 December 1986 forwarding the 2nd defendant's certificate of payment of:

| | | |
|---|---|---|
| (i) Handing over of vacant possession & connection of water & electricity supply of the building | 15% | RM69,000 |
| (ii) To stakeholders: M/s Syed Alwi Ng & Teoh | 5% | RM23,000 |
| | | RM92,000 |

Exhibit "LHS6": letter from the 1st plaintiff's solicitors to the 2nd defendant dated 26 May 1990 which contained the following passages:

> 3. We are instructed that the said certification was a misrepresentation and erroneous as the electricity supply was connected to our client's property which is Lot SH19 only on 7 March 1990.
>
> 4. By reason of the above our client has been caused to pay unnecessary interest amounting to RM30,901.28 for the loan of the above said sums of RM69,000 and RM23,000 over the period of 13 January 1990 1987 (sic) to 7 March 1990.
>
> 5. Our further instructions are to demand from you which we hereby do that you compensate our client for the incurrence of the interest aforesaid. Take notice that unless the said sum of RM30,901.28 and a further sum of RM150 being our solicitors' cost for this letter is paid to us as solicitors within 7 days from the date hereof our instructions are to commence legal proceedings against you for the recovery thereof and further interest and costs.

In the affidavit, it was stated that:

> the defendants are and were justly and truly liable to the 1st plaintiff for the damages together thereon. As a result of certain payments made to the 1st defendant pursuant to a certificate issued by the 2nd defendant
>
> ... there is no defence to this action except for the amount of damages as regards the 1st plaintiff's claim for damages against both defendants.

Another affidavit was affirmed by Low Hup Seng on behalf of the 1st plaintiff on 8 November 1990 (Encl. 9) in which it was stated:

3. As further evidence that electricity supply was not connected right up to at least 16 December 1989 (if not later) now produced and shown to me marked accordingly are copies of the following documents:

| | | |
|---|---|---|
| 3.1 "LHS7" | : | letter dated the 18 October 1989 from Biro Pengaduan Awam, Jabatan Perdana Menteri; |
| 3.2 "LHS8" | : | letter dated the 15 November 1989 from the 1st defendant enclosing LLN forms for completion before electricity supply would be connected; |
| 3.3 "LHS9" | : | letter dated the 16 November 1989 from the 1st plaintiff to the 1st defendant (returning the LLN forms duly signed and chopped with a reminder that electricity deposit of RM1,180 had been posted to the 1st defendant on 14 November 1989). |

4. As pleaded in para. 12 of the statement of claim, vacant possession was delivered by the 1st defendant to me on 7 March 1990. Now produced and shown to me marked "LHS10" is a true copy of a letter dated 14 February 1990 from the 1st defendant to the 1st plaintiff requesting the 1st plaintiff to take delivery of vacant possession. Now produced and shown to me marked "LHS11" is a true copy of the document dated 7 March 1990. I signed acknowledging receipt of the keys to the house and of taking possession" (words in parenthesis supplied).

The 1st defendant through its chairman Lin Kim Hock affirmed an affidavit-in-reply dated 13 December 1990 in which it was stated *inter alia* that as the 1st defendant had obtained an order in Civil Suit D1-24-281-84 approving a composite scheme of arrangement proposed to be made between "the applicants (which included the 1st defendant, their creditors and the holders of the scheme shares") the plaintiffs could not now proceed with their action against the 1st defendant.

The 2nd defendant through its chairman, Wong Kin Men, affirmed an affidavit dated 19 December 1990 (Encl. 12) in which it was stated firstly that pursuant to Clauses 15(1) and (2) of the sale and purchase agreement it was the responsibility of the 1st defendant as vendor to cause to be laid all necessary water, electricity and sewerage mains to the building at its own costs, and the 1st plaintiff as purchaser was liable to pay for the deposits of installation of water and electricity meters. The delay in handing over vacant possession of the land and building was not due to the negligence of the 2nd defendant as it had duly checked and was satisfied that the project was completed when it issued the certification on 18 December 1986. The 2nd defendant could not be asked to bear the burden of ensuring the 1st defendant's responsibility of applying to the appropriate authority for the electricity supply. From the documents produced by the 1st plaintiff annexed to the affidavits of Low Hup Seng it clearly showed that it was due to the failure on the part of the 1st defendant to deliver vacant possession on time and not in any way due to the fault of the 2nd defendant.

In his submission, Counsel for the 2nd defendant submitted that the pleadings of the plaintiffs created some confusion in particular para. 15 of the statement of claim in which the plaintiffs averred that the 1st plaintiff had suffered loss and damage and gave particulars of the said loss and damage. According to Counsel the pleading in the said para. 15 was bad because the 2nd defendant could not be expected to know the claim against him and this would prejudice the 2nd defendant. It is to be noted that Counsel had not said a single word regarding the question of liability on the part of the 2nd defendant.

From the pleadings of the respective parties and the affidavit evidence adduced, I have no doubt at all that the 2nd defendant is guilty of negligence and/or misrepresentation and I say so for these reasons. There is firstly no denial that the 2nd defendant certified final

payments of two sums of RM69,000 and RM23,000 on 22 December 1986. Under the Third Schedule of the sale and purchase agreement item 3 and 4 payments for the two sums were due only "On handing over of vacant possession and **connection of water and electricity".** Pursuant to Clause 4(11) of the sale and purchase agreement the balance of the purchase price would have to be paid by instalments and at the time and in the manner as prescribed in the Third Schedule thereto" and under subclause (2) of that clause it was stated:

> Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate under **the hand of the vendor's architect** and every such certificate so signed **shall be proof of the fact that the works therein referred to have been completed.** (Emphasis supplied)

Secondly there is equally no denial that the 2nd plaintiff, as financier of the 1st plaintiff relying on the certification of the 2nd defendant made payments of the said two sums to the 1st defendant on 13 February 1987. Thirdly it is again indisputable that application for electricity supply could only be made to LLN when the 1st defendant sent the relevant Forms to the 1st plaintiff on 16 November 1989 and it was only on 14 February 1990 that the 1st defendant was ready to hand over vacant possession of the building with water and electricity supply. Bearing in mind that had all the electrical works been ready to receive electricity from the main supply of LLN it would be a simple matter of filling some forms and payment of a deposit whereupon LLN would take the necessary steps to supply electricity to the building. The fact that an application for electricity could only be made to LLN on or about 16 November 1989 must, on the balance of probabilities, show that the electrical works had not been completed or satisfactorily completed when the 2nd defendant issued its certificate on 22 December 1986. Had the electrical works been completed on the date of the 2nd defendant's certification, it is highly incredible that the 1st defendant would have waited for nearly three years before requesting the 1st plaintiff to apply to LLN for electricity supply. There is no earthly reason for such a long delay had the electrical works been completed or satisfactorily completed in 1986. The one and only conclusion that I can arrive at is that the electrical works were not completed or satisfactorily completed in 1986 when the 2nd defendant issued its certification on 22 December 1986. I reiterate that the 2nd defendant is guilty of negligence and/or misrepresentation which caused the 1st plaintiff to suffer loss or damage in that it had to pay interests to the 2nd plaintiff for the premature release of the said two sums of money. Notwithstanding the above finding it is still necessary to consider whether the 2nd defendant owed the plaintiffs a duty of care for "no case of actionable negligence will arise unless the duty to be careful exists (per Lord Wright in *Grant v. Australian Knitting Mills Ltd.* [1936] AC 85 @ 103). The recognition of liability for careless misstatements is settled by the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465. The principle is that there is a duty situation whenever:

> the party seeking information or advice was trusting the order to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.

This principle is advanced further in *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373. There a builder, X, had started to build a house on land belonging to him and on the site of an old rubbish tip, which had been filled in. The foundations were not strong enough to support the kind of house that was being built on such insecure soil. An inspector of the defendant Council negligently failed to discover that the foundations were inadequate and in consequence approval was given to X to proceed with the house. X did so and eventually sold the house to a purchaser, who later sold it to the plaintiff. Serious structural

defects soon began to appear as the house subsided. The plaintiff sued the defendants who were held liable. A point that emerges from this case is that it is not even essential to show that the plaintiff relied on the defendant's statement in buying the house. The liability of the defendant is established once it is found that they owe a duty of care in giving the approval to proceed with the building to the purchaser of the house. Applying the principles laid down in the aforecited cases to the present case, it is clear that the 2nd defendant whose duty was to issue a certificate of final payments when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty of care to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments to the 1st defendant. Finally as regards to the pleadings in the statement of claim there is no doubt that the plaintiffs were claiming against both the defendants for loss or damage suffered by them due to the premature payments which caused them to have to pay extra interest to their financier the 2nd defendant in the sum of RM30,901.28 for the period from 13 January 1987 to 7 March 1990. This claim was clearly pleaded in paras. 14 and 15 of the statement of claim. On the grounds as stated above, I therefore allowed the appeal of the 1st plaintiff against the 2nd defendant and directed that damages be assessed by the Court.

Also found at [1991] 1 CLJ 102